80-1023

No. 80-

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

SHIRLEY M. HUFSTEDLER, SECRETARY OF EDUCATION, ET AL.

v.

DOUGHERTY COUNTY SCHOOL SYSTEM, ACTING THROUGH THE DOUGHERTY COUNTY BOARD OF EDUCATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-

SHIRLEY M. HUFSTEDLER, SECRETARY OF EDUCATION, ET AL.*

v.

DOUGHERTY COUNTY SCHOOL SYSTEM, ACTING THROUGH THE DOUGHERTY COUNTY BOARD OF EDUCATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTION PRESENTED

Whether a regulation prohibiting employment discrimination based upon sex "under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance" (34 C.F.R. 106.51(a)(1)) is authorized by Sections 901(a) and 902 of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682.

* The named defendants-appellants in the court of appeals were the Department of Health, Education, and Welfare and Patricia Roberts Harris, who was Secretary of Health, Education, and Welfare until the enactment of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668. Under Section 301(a)(3) of that Act, 93 Stat. 678, the functions of HEW under Title IX were transferred to the Department of Education. Because Secretary Hufstedler is the successor to Secretary Harris with regard to these functions, we have substituted Secretary Hufstedler and the Department of Education as the federal parties in this case, pursuant to Rule 40.3 of the Rules of this Court.

There were no additional appellees in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and regulations involved	1
Statement	2
Reasons for granting the petition	5
Conclusion	6
Appendix A	1a
Appendix B	8a
Appendix C	9a
Appendix D	12a

TABLE OF AUTHORITIES

Cases:

Brunswick School Board v. *Califano*, 449 F. Supp. 866, aff'd *sub nom. Islesboro School Committee* v. *Califano*, 593 F.2d 424, cert. denied, 444 U.S. 972	3-4
North Haven Board of Education v. *Hufstedler*, 629 F.2d 773	5
Romeo Community Schools v. *HEW*, 438 F. Supp. 1021, aff'd, 600 F.2d 581, cert. denied, 444 U.S. 972	4
Seattle University v. *HEW*, No. 77-631S (W.D. Wash. Jan. 3, 1978), aff'd, 621 F.2d 992, petition for cert. granted, No. 80-493 (Dec. 1, 1980)	4

Statutes and regulations:

Education Amendments of 1972, Title IX, 20 U.S.C. 1681 *et seq.*	2
Section 901(a), 20 U.S.C. 1681(a)	1, 2
Section 902, 20 U.S.C. 1682	1, 2
34 C.F.R. 106.51 *et seq.*	2
Section 106.51(a)(1)	1
Section 106.54	1
45 C.F.R. 86.51 *et seq.* (1979)	2

The Solicitor General, on behalf of the United States Department of Education and the Secretary of Education, Shirley M. Hufstedler, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 622 F.2d 735. The opinion of the district court (App. C, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1980 (App. B, *infra*). On October 17, 1980, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including December 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. The pertinent portions of the statutes involved (Sections 901(a) and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682) are printed at pages 1-5 of the petition in *United States Department of Education* v. *Seattle University*, No. 80-493 (October Term 1980).[1]

2. The pertinent regulations (34 C.F.R. 106.51 (a)(1) and 34 C.F.R. 106.54) are printed at pages 5-6 of the petition in *Seattle University*.

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[1] We are supplying respondent with a copy of our petition in *Seattle University*.

STATEMENT

The Dougherty County School System (hereinafter "Dougherty County") filed this action on June 13, 1978, to enjoin an administrative enforcement proceeding brought by the Department of Health, Education, and Welfare (HEW)[2] under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* (hereinafter "Title IX").

Dougherty County receives federal financial assistance in support of its educational programs and activities (App. A, *infra*, 6a-7a), and it is therefore subject to the provisions of Title IX and to authorized implementing regulations promulgated by the federal agencies and departments through which it receives such financial assistance. Section 902 of Title IX, 20 U.S.C. 1682.

To implement Section 901(a) of Title IX, 20 U.S.C. 1681(a), which provides that, with certain enumerated exceptions, "[n]o person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," HEW issued regulations that, *inter alia*, prohibit sex discrimination in the employment practices of federal education aid recipients. 45 C.F.R. 86.51 *et seq.* (1979) (now codified at 34 C.F.R. 106.51 *et seq.*).

In January 1976, HEW notified the superintendent of Dougherty County that it had received a com-

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[2] As explained above (page I note * *supra*), the functions of HEW under Title IX of the Education Amendments of 1972 have been transferred to the Department of Education. All of the relevant actions in this case were taken by HEW prior to the reorganization.

plaint from a female home economics teacher alleging sex discrimination in the payment of salaries, in violation of Title IX. HEW conducted an investigation of the complaint, and on November 15, 1976, sent a letter of findings to Dougherty County which concluded that the payment of a 12% salary supplement to industrial arts teachers without payment of a similar supplement to home economics teachers constituted sex discrimination. The letter requested that the school system take action to correct the discrimination (R. 14-15). After Dougherty County declined to take corrective action, HEW commenced administrative proceedings seeking to terminate federal financial assistance (R. 6, 30-33, 150, 250). Prior to a scheduled administrative hearing, however, Dougherty County filed its complaint in the district court seeking an injunction against further administrative enforcement action and a declaratory judgment that the Title IX regulation which was the basis for that action was promulgated in excess of the Secretary's authority under the statute (R. 3-9).[3]

2. On cross-motions for summary judgment, the district court ruled for Dougherty County, holding that Title IX "does not cover employment practices of recipients of federal financial assistance and does not authorize the Secretary to promulgate regulations prohibiting sex discrimination in employment" (App. C, *infra*, 10a). In a two-page order, the court adopted the reasoning of three prior district court opinions: *Brunswick School Board* v. *Califano*, 449 F. Supp. 866 (D. Maine 1978), aff'd *sub nom. Isles-*

[3] As a result of a stipulation between the parties, the administrative process was halted and HEW lifted its deferral of consideration of applications by Dougherty County for funding of new activities.

boro School Committee v. *Califano*, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979); *Seattle University* v. *HEW*, No. 77-631S (W.D. Wash. Jan. 3, 1978), aff'd, 621 F.2d 992 (9th Cir. 1980), petition for cert. granted, No. 80-493 (Dec. 1, 1980); and *Romeo Community Schools* v. *HEW*, 438 F. Supp. 1021 (E.D. Mich. 1977), aff'd, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979) (App. C, *infra*, 10a).

3. The court of appeals affirmed the grant of summary judgment declaring the regulations invalid (App. A, *infra*, 1a-7a). However, the court limited its decision to the "invalidity of the regulations as written, without agreeing with the district court and the three circuit courts that the Secretary's authority is limited to regulation only of policies affecting students" (App. A, *infra*, 4a). In contrast to the courts of appeals in *Romeo Community Schools* v. *HEW*, *supra*, *Seattle University* v. *HEW*, *supra*, and *Islesboro School Committee* v. *Califano*, *supra*, the court concluded that both the language of the statute and the legislative history "support[] an interpretation of the statute that reaches at least some employment practices" (App. A, *infra*, 7a). The court reasoned that, under the allegations in this case, a female home economics teacher whose salary is defrayed by federal funds and who is paid less than a male vocational education teacher for equal work is "subjected to discrimination under" a program receiving federal financial assistance (App. A, *infra*, 7a). The court held, however, "that the Secretary exceeded his authority by enacting general regulations prohibiting sex discrimination in employment without limiting their effect to specific programs that receive federal financial assistance" (*ibid.*).

REASONS FOR GRANTING THE PETITION

Although the question presented in this case is not identical to that presented in *United States Department of Education* v. *Seattle University*, No. 80-493, in which this Court granted the petition for certiorari on December 1, 1980, the question is closely related and involves the same regulations at issue in *Seattle University*. While the court of appeals in the present case concluded that some regulation of the employment practices of educational federal aid recipients is authorized by Title IX, it affirmed the district court's judgment invalidating the regulations promulgated by HEW because they were not "limited to employees whose compensation is defrayed in whole or in part by federal assistance or even to those who work in programs receiving federal aid or with students who are federally assisted" (App. A, *infra*, 3a).

We disagree with the court of appeals that the specific purposes for which federal funds are used by an educational institution or school system properly control the scope of regulations under Title IX or the Department of Education's authority to investigate possible employment discrimination in the institution or system's educational program.[4] We therefore believe that its decision should be reversed. However, because this Court's decision in *Seattle University* may well be dispositive of the issue in this case, it would be appropriate for the Court to defer

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[4] We acknowledge, however, that the Department's fund-termination authority under Section 902 is limited to "the particular program or part thereof" in which discrimination or its effects are shown. See *North Haven Board of Education* v. *Hufstedler*, 629 F.2d 773, 785-786 (2d Cir. 1980).

disposition of this petition pending final disposition of the petition in *Seattle University*.

CONCLUSION

The Court should defer disposition of the petition for a writ of certiorari pending its decision in *United States Department of Education* v. *Seattle University*.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 78-3384

DOUGHERTY COUNTY SCHOOL SYSTEM, ETC.,
PLAINTIFF-APPELLEE

v.

PATRICIA ROBERTS HARRIS, Secretary of Health and Human Services, DEFENDANTS-APPELLANTS

July 28, 1980

Appeal from the United States District Court for the Middle District of Georgia

Before DYER, RUBIN and POLITZ, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The Secretary of Health, Education, and Welfare asserts that Title IX of the Education Amendments of 1972, prohibiting discrimination on the basis of sex in any education program or activity receiving federal financial assistance, authorizes regulations prohibiting sex discrimination in general employment practices by recipients of federal aid.[1] We find

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[1] All functions of HEW relating to Title IX have been transferred to the Department of Education. 20 U.S.C. § 1681 (Supp. 1980).

that regulations with this breadth exceed the Secretary's authority under Title IX and, therefore, affirm a summary judgment declaring them invalid.

The statute upon which the Secretary relies for authority states in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681(a).

Section 1682 of Title IX authorizes HEW to initiate administrative proceedings to enforce compliance with the statute if it does not obtain voluntary compliance. The primary sanction for noncompliance is termination of federal aid for the program in which there was discrimination. The same section gives HEW the authority to promulgate regulations to effectuate the provisions of § 1681.

Exerting what he conceived to be his authority under the Act, the Secretary promulgated regulations [2]

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[2] The regulations at issue in this case state:

§ 86.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

* * * * * *

[Footnote continued on page 3a]

prohibiting any school that receives federal financial assistance from engaging in sexual discrimination in employment practices. The regulations are not limited to employees whose compensation is defrayed in whole or in part by federal assistance or even to those who work in programs receiving federal aid or with students who are federally assisted. Instead, they apply to all employees of the entire school system so long as any program or activity of that school receives any federal assistance.

Following a complaint and an investigation, the Secretary determined that the Dougherty County School System (the School) had violated the regulations by paying a salary supplement to industrial arts teachers but not to home economic teachers. When HEW notified the School that all federal funding for new activities for elementary and secondary education was being deferred, the School sued for

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[2] [Continued]

(b) *Application.* The provisions of this subpart apply to:

* * * * * *

(3) Rates of pay or any other form of compensation, and changes in compensation;

45 C.F.R. § 86.51.

§ 86.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex: (a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

45 C.F.R. § 86.54.

injunctive and declaratory relief, arguing that the regulations were invalid. On motion for summary judgment, the trial judge held that the statute permits regulation only of discriminatory actions affecting students, not of policies affecting employees, and HEW appealed. Four circuit courts have reached the same conclusion.[3] We agree with the district court that the sweeping regulations exceed the Secretary's authority. However, we limit our opinion to the invalidity of the regulations as written, without agreeing with the district court and the three circuit courts that the Secretary's authority is limited to regulation only of policies affecting students.

Courts give great weight to an agency's interpretation of the scope of its enabling statute, but this deference is limited by a court's "obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history." *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Daniel*, 439 U.S 551, 566, n.20, 99 S.Ct. 790, 800, n.20, 58 L.Ed.2d 808, 820 (1979). *See also Coca-Cola Co.* v. *Atchison, Topeka and Santa*

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[3] *Seattle University* v. *United States Department of HEW*, —— F.2d —— (9th Cir. 1980); *Romeo Community Schools* v. *United States Department of HEW*, 600 F.2d 581 (6th Cir.), *cert. denied*, —— U.S. ——, 100 S.Ct. 467, 62 L.Ed.2d 388 (1979); *Junior College District of St. Louis* v. *Califano*, 597 F.2d 119 (8th Cir.), *cert. denied*, —— U.S. ——, 100 S.Ct. 467, 62 L.Ed.2d 388 (1979); *Islesboro School Committee* v. *Califano*, 593 F.2d 424 (1st Cir.), *cert. denied*, —— U.S. ——, 100 S.Ct. 467, 62 L.Ed.2d 387 (1979).

See also University of Toledo v. *United States Department of HEW*, 464 F.Supp. 693 (N.D. Ohio 1979); *Romeo Community Schools* v. *United States Department of HEW*, 438 F.Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, —— U.S. ——, 100 S.Ct. 467, 62 L.Ed.2d 388 (1979).

Fe Railway Company, 608 F.2d 213, 222 (5th Cir. 1979).

Even according great latitude to the Secretary, we cannot find sanction in the statute for his conclusion that any discrimination in an entire school system so taints the system as to permit termination of all federal aid even though federally assisted programs are administered impeccably. The regulations attempt to regulate sex discrimination in employment practices generally rather than in connection with specific programs receiving federal funds. The statute itself indicates that such regulations sweep too broadly. Section 1682 states that a department is authorized "to effectuate the provisions of section 1681 of this title with *respect to such program or activity* by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the *financial assistance in connection with which the action is taken.*" 20 U.S.C. § 1682 (emphasis added). Further evidence that the regulations must be keyed to a specific program is found in the enforcement provisions. Section 1682 states that termination or refusal of federal funds "shall be limited in its effect to the particular program, or part thereof, *in which such noncompliance has been so found.*" 20 U.S.C. § 1682 (emphasis added).[4]

The decision of the trial court and those of the four circuit courts appear to us, like the regulations at issue here, to rest on a rationale so broad that they would inhibit a narrower, yet to us apparently valid,

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[4] *Cf. Board of Public Instruction of Taylor County* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969) (termination of funds under Title VI of the Civil Rights Act must be made on a program-by-program basis).

exercise of the Secretary's authority.[5] In this respect, they yield to the issues as presented by the advocates. In typical adversary posture, the parties have taken diametrically opposite positions in each case. The Secretary has contended that the regulations are valid in toto. The schools have argued that the Secretary may regulate only sex discrimination among students. However, a question lurks in the ground between these fortified lines: even if the Secretary may not validly regulate the entire school system, may he regulate with respect to faculty who are paid with federal funds?

The statute begins with the words "no person", not with a more limited phrase such as "no student". It protects all who may be "excluded from participation in, be denied the benefits of, or be *subjected to discrimination under*" education programs or activities receiving federal assistance. 20 U.S.C. § 1681 (emphasis supplied). A female teacher whose salary is defrayed by federal funds and who is paid less than a male teacher in the same program is subjected to discrimination under the program. The alleged facts of this case serve as an example. There is evidence that the School receives aid from federal vocational ed-

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[5] Although we disagree with the broad holdings of the other four circuit courts to the effect that only students are protected by Title IX, we agree that HEW exceeded its power in two of those cases. *Romeo Community Schools* v. *United States Department of HEW*, 600 F.2d 581 (6th Cir.), *cert. denied*, —— U.S. ——, 100 S.Ct. 467, 62 L.Ed.2d 388 (1979), and *Iselsboro School Committee* v. *Califano*, 593 F.2d 424 (1st Cir.), *cert. denied*, —— U.S. ——, 100 S.Ct. 467, 62 L.Ed.2d 387 (1979), dealt with general regulations concerning pregnancy policies. We agree that HEW may not regulate this aspect of employment merely because the employer is a recipient of federal financial assistance.

ucation funds and that a substantial portion of these funds goes toward the salaries of home economics and vocational education teachers. Therefore, if a female home economics teacher receives less pay than a male vocational educational teacher for equal work, she is being "subjected to discrimination under" a program receiving federal financial assistance.

The legislative history also supports an interpretation of the statute that reaches at least some employment practices. The sponsor of the amendments, Senator Bayh, stated in a section entitled "Prohibition of Sex Discrimination in Federally Funded Education Programs":

> This portion of the amendment covers discrimination in all areas where abuse has been mentioned —employment practices for faculty and administrators, scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth.

118 Cong.Rec. 5807 (1972).

Therefore, we hold that the Secretary exceeded his authority by enacting general regulations prohibiting sex discrimination in employment without limiting their effect to specific programs that receive federal financial assistance. We AFFIRM the grant of summary judgment declaring the regulations invalid.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3384

D.C. Docket No. CA 78-30-A1b.

DOUGHERTY COUNTY SCHOOL SYSTEM, ETC.,
PLAINTIFF-APPELLEE

versus

PARTICIA ROBERTS HARRIS, Secretary of
Health and Human Services, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Middle District of Georgia

Before DYER, RUBIN and POLITZ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

July 28, 1980

Issued as Mandate: Aug. 19, 1980

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

Civil Action No. 78-30-ALB

DOUGHERTY COUNTY SCHOOL SYSTEM, PLAINTIFF

v.

JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare, *et al.*, DEFENDANT

OWENS, District Judge:

Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C.A. § 1681, provides in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

To implement this Congressional mandate, the Secretary of Health, Education and Welfare (Secretary) promulgated certain regulations including 45 C.F.R. Part 86, Subpart E which prohibits sex discrimination in employment by recipients of federal educational assistance. Following a complaint and investigation, the Secretary determined that the Dougherty County School System (Dougherty) was guilty of ongoing sex discrimination in employment because the

local salary supplements paid home economics teachers by Dougherty were below those paid industrial arts teachers. On March 3, 1978 the Secretary notified Dougherty that all federal funding for new activities for elementary and secondary education was being deferred because of Dougherty's violation of 45 C.F.R. § 86.51(b). Subsequently Dougherty instituted the present suit for injunctive and declaratory relief. Both sides have submitted motions for summary judgment.

The initial issue presented is purely a question of law, that is, whether Title IX of the Education Amendments of 1972, 20 U.S.C.A. § 1681 *et seq.* authorized the Secretary to promulgate regulations governing sex discrimination in employment. Three district courts have already resolved this issue against the Secretary. *Brunswick Sch.Bd. v. Califano*, 449 F. Supp. 866 (D.Me. 1978); *Seattle University v. United States Department of Health, Education and Welfare*, No. 77-6315 (W.D. Wash. Jan 3, 1978); *Romeo Community Schools v. United States Department of Health, Education and Welfare*, 438 F.Supp. 1021 (E.D. Mich. 1977), *appeal pending*, Nos. 77-1691 & 92 (6th Cir. 1977). The reasoning of these opinions is thorough and persuasive and is hereby adopted by this court. This court holds that Title IX of the Education Amendments of 1972 does not cover employment practices of recipients of federal financial assistance and does not authorize the Secretary to promulgate regulations prohibiting sex discrimination in employment.

Accordingly, summary judgment must be granted in favor of the plaintiff. Judgment will be entered declaring 45 C.F.R. § 86.51(b) to be invalid and of no legal force and effect and enjoining the defendants

from withholding any assistance from the plaintiff because of alleged non-compliance with that regulation.

SO ORDERED, this 22nd day of August 1978.

/s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

Civil Action No. 78-30-ALB

DOUGHERTY COUNTY SCHOOL SYSTEM, PLAINTIFF

vs.

JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare, *et al.*, DEFENDANTS

ORDER

Rule 60(a), Federal Rules of Civil Procedure, permits the court of its own initiative to correct clerical mistakes in its orders and judgment. Pursuant to that rule the court's order of October 6, 1978 (Exhibit "A"), is hereby stricken in its entirety and the last paragraph of the court's order of August 22, 1978, is corrected so that as corrected it reads:

> Accordingly, summary judgment must be granted in favor of the plaintiff. Judgment will be entered declaring the regulations promulgated by the Secretary entitled "Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited", 45 C.F.R. § 86.51, *et seq* to be invalid and of no legal force and effect and enjoining the defendants from withholding any

assistance from the plaintiff because of alleged non-compliance with all or any portion of those regulations.

SO ORDERED, this the 12th day of October, 1978.

/s/ Wilbur D. Owens, Jr.
WILBUR D. OWENS, JR.
United States District Judge

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Petitioner,

v.

DOUGHERTY COUNTY SCHOOL SYSTEM, ACTING THROUGH
THE DOUGHERTY COUNTY BOARD OF EDUCATION
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
ARGUMENT	2
I. THIS COURT HAS DENIED CERTIORARI IN CASES PRESENTING THE SAME ISSUE	2
II. THERE IS NO SPLIT OF AUTHORITY BETWEEN CIRCUIT COURTS IN CASES THAT INVOLVE ACTUAL CONTROVERSY	2
CONCLUSION	3

TABLE OF AUTHORITIES

CASES:	PAGE
Islesboro School Committee v. *Califano*, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979)	2
Junior College District of St. Louis v. *Califano*, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979)	2
North Haven Board of Education v. *Hufstedler*, Nos. 79-6136, 79-6247 and 79-7747 (2d Cir. July 24, 1980) Supreme Court No. 80-986	2, 3
Romeo Community Schools v. *HEW*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979)	2
Seattle University v. *HEW*, No. 77-631S (W.D. Wash. Jan. 3, 1978), aff'd, 621 F.2d 992, petition for cert. granted, No. 80-493 (Dec. 1, 1980)	2, 3
OTHER AUTHORITY:	
Supreme Court Rule 19	2

IN THE

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OCTOBER TERM, 1980

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Petitioner,

v.

DOUGHERTY COUNTY SCHOOL SYSTEM, ACTING THROUGH
THE DOUGHERTY COUNTY BOARD OF EDUCATION
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Dougherty County School System responds to the petition of the United States Department of Education to review by writ of certiorari the judgment of the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

Review on writ of certiorari should be granted only where there are special and important reasons therefor. Rule 19, Supreme Court Rules. Respondent respectfully submits that no such special and important reasons exist under the facts of this case to justify granting the requested writ.

I. This Court Has Denied Certiorari In Cases Presenting The Same Issue

Petitioner has applied to this Court on other occasions for a writ of certiorari in cases which, while factually different, nevertheless, presented to this Court the identical issue. *Romeo Community Schools* v. *HEW*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Islesboro School Committee* v. *Califano*, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979); *Junior College District of St. Louis* v. *Califano*, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979). Respondent respectfully submits that there exists no legal issue or factual distinction in the case at bar which would require this Court to reach a contrary result to that of the cases which Petitioner has already attempted to present to this Court through certiorari.

II. There Is No Split Of Authority Between Circuit Courts In Cases That Involve Actual Controversy

There are two other cases pending before this Court which deal with the same regulations which form the basis of the controversy in this case. *North Haven Board of Education* v. *Hufstedler*, Nos. 79-6136, 79-6247, and 79-7747 (2d Cir. July 24, 1980), Supreme Court No. 80-986; *Seattle University* v. *HEW*, No.

77-631S (W.D. Wash. Jan. 3, 1978), aff'd, 621 F.2d 992, petition for cert. granted, No. 80-493 (Dec. 1, 1980).

In the *Seattle* case the attorneys for the university have petitioned this Court for permission to withdraw and have asserted that the issue is now moot. Under the authority presented by Respondent in the *Seattle* case, it appears as though the Petition for leave to withdraw should be granted in that case and that would leave the present action and the *North Haven* case.

The Second Circuit's decision in the *North Haven* case is not a final decision since a timely petition for rehearing has been filed and is pending before the Second Circuit Court of Appeals.

Therefore, no conflict exists between the Court of Appeal at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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